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## HARD-CORE PORNOGRAPHY: A PROPOSAL FOR A PER SE RULE

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Bruce A. Taylor\*

Public opinion polls reveal that many American people want the government to crack down harder on pornography and to restrict access to pornography that meets the legal standard of obscenity.<sup>1</sup> The Supreme Court has repeatedly ruled that obscenity is without first amendment protection.<sup>2</sup> Why, then, does the problem of hard-core pornography persist? The Attorney General's Commission on Pornography concluded in 1986 that hard-core pornography flourishes in violation of existing laws due to "underinvestigation, underprosecution, and under-sentencing."<sup>3</sup> This Article suggests that those findings are mere symptoms of a more severe ailment. A more fundamental problem is the complexity of the legal test for obscenity, which leads to discouragement of law enforcement efforts and inconsistent judicial rulings.

Part I of this Article discusses the history and pervasiveness of the pornography problem. Part II explains the current legal test for obscenity, as evolved from *Miller v. California*,<sup>4</sup> with an emphasis on terms commonly used in the definition of obscenity.

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1. See *Pornography: A Poll*, TIME, July 21, 1986, at 22 [hereinafter TIME Poll]; *Poll: Mixed Feelings on Pornography*, NEWSWEEK Mar. 18, 1985, at 60; The Gallup Poll, Aug. 14, 1986; The Gallup Poll, Apr. 3, 1977. For a legal definition of obscenity, see *infra* text accompanying note 27.

2. *Miller v. California*, 413 U.S. 15, 23 (1973) ("This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment.") (citations omitted). See also *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986); *Roth v. United States*, 354 U.S. 476, 484-85 (1957); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

3. 1 ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY, U.S. DEP'T OF JUST., FINAL REPORT 367 (1986) [hereinafter COMM'N ON PORNOGRAPHY].

4. 413 U.S. 15 (1973).

Part III examines the problems in applying *Miller* that suggest that the application of a per se hard-core pornography rule may be appropriate. Finally, Part IV presents a proposal for a per se hard-core pornography rule, similar to child pornography laws existing in many jurisdictions and upheld by the Supreme Court in *New York v. Ferber*.<sup>5</sup> This Article concludes that Congress and the state legislatures should adopt an objective definition of obscenity that would make commercial distribution of all hard-core pornography per se illegal. Such laws would remove most of the confusion regarding what material is legal or illegal, providing a clear definitional line for producers and merchants. Prosecution of violators would become more frequent and efficient. Eventually, the bulk of the illegal pornography industry's prostitution-based trade<sup>6</sup> would become unmarketable, and, like child pornography, retreat into an underground culture far from the general public.

## I. THE PROLIFERATION OF ILLEGAL HARD-CORE PORNOGRAPHY

Prosecutors and lawyers, including the author, who are experienced in obscenity cases, have witnessed many changes in the past fifteen years. In the mid 1970's, when a judge informed a panel of prospective jurors that the case involved obscenity, many immediately thought of *Penthouse*, *Hustler*, and other men's magazines sold at convenience stores and on newsstands. Few had been exposed to hard-core pornography, which shows things they had only heard about—explicit photographs of actual sex acts, including everything from blood, to goats, to groups. Many female jurors did not want to see such hard-core pornography and were excused as unable to be fair and impartial. If the name of the movie or magazine suggested homosexuality, many men also did not want to see the material.

Despite walkouts by potential jurors who were qualified but did not wish to view the evidence, the jurors who *did* serve usually voted to convict. Though most people had seen *Playboy* and some nudity and simulated sex in R-rated movies, the explicit material that could only be obtained at "dirty" bookstores or viewed at "adult" theatres still met with universal disapproval

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5. 458 U.S. 747 (1982).

6. The production of explicit pornography normally involves prostitution-like payment of money for sexual performances, as discussed *infra* in Part IV. See *infra* notes 140-41.

in courts of law. Those cities that actively prosecuted obscenity cases obtained convictions in almost every trial in which they managed to get a jury verdict.<sup>7</sup> Several convictions were obtained in state and federal courts in California.<sup>8</sup> Then, a series of acquittals and hung juries in the Los Angeles area in 1976 and 1977 prompted prosecutors there to abandon enforcement except for violent, animal, and child pornography cases.<sup>9</sup> That surrender in Los Angeles, along with lack of enforcement in New York City, contributed greatly to the growth in the availability of hard-core pornography in America, because the pornography syndicate produces almost all hard-core films, videos, and magazines in those cities.<sup>10</sup> This substantial industry provides soft, medium, and hard-core pornography to cable, subscription, and satellite television services; dial-porn telephone services; convenience stores; "adult" bookstores and theatres; mail-order services; and now video stores. A majority of Americans now have been exposed to some form of pornography.<sup>11</sup> Currently, a panel of prospective jurors is likely to include several members who have seen hard-core, X-rated material, probably from videocassette rentals.<sup>12</sup> Prosecutors now expect to have several "conservative" and "religious" people excused and to have a few people serve on the trial jury who have been customers or viewers. The criminal trial juries of the 1980's are judging material they have seen in their private lives, whereas juries in the 1960's

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7. For example, Cincinnati, Buffalo, Atlanta, Boston, Norfolk, Arlington, Houston, Omaha, and Cleveland, along with many cities in states including Florida, Illinois, Texas, the Carolinas, Colorado, Washington, Utah, New York, Indiana, Kentucky, and Michigan have enjoyed great success in eliminating pornography from their communities. See *infra* note 13.

8. *Pinkus v. United States*, 436 U.S. 293 (1978); *Splawn v. California*, 431 U.S. 595 (1977); *Hamling v. United States*, 418 U.S. 87 (1974); *Kaplan v. California*, 413 U.S. 115 (1973); *Miller v. California*, 413 U.S. 15 (1973).

9. Interview by author with Stephen Trott, then U.S. Attorney for the Central District of California and former Deputy District Attorney for Los Angeles County (March 26, 1984). Mr. Trott was a distinguished trial prosecutor, became Associate Attorney General of the United States, and has been appointed by President Reagan to the Court of Appeals for the Ninth Circuit.

10. In 1986, the Attorney General's Commission on Pornography reported that at least 80% of hard-core tapes, films, and devices are produced in Los Angeles County. 2 COMM'N ON PORNOGRAPHY, *supra* note 3, at 1366. The Commission also reported that up to 90% of the pornography industry is controlled by organized crime families. *Id.* at 1048-49 (statement of Daryl F. Gates, Chief of Los Angeles Police Dep't). The control of these families has historically been in New York City. See generally *id.* at 1037-1238 (chapter on organized crime). The "pornography syndicate" is a law enforcement trade term for the collection of producers, directors, performers, and distributors who make and market hard-core, explicit films and magazines.

11. TIME Poll, *supra* note 1.

12. *Id.*

and 1970's were judging material they had never seen before. Nevertheless, based upon this author's experience, convictions are obtained in approximately seventy to ninety percent of the cases currently tried.<sup>13</sup>

Hard-core pornography has permeated local communities to the extent that now many cities and counties have some sort of traffic in such magazines or videos.<sup>14</sup> In the early 1970's, hard-core material was available only in the "adult" bookstores and theatres in the downtowns of America's largest cities.<sup>15</sup> By the late 1970's, these pornography outlets were in most large metropolitan areas.<sup>16</sup> In the last five years, hard-core films on video cassettes have become available in a majority of the otherwise legitimate video stores and chains in the United States.<sup>17</sup> For the first time, the pornography syndicate can distribute its products without owning the retail outlets. The businesspersons who own video stores are not the syndicate-controlled people found in

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13. No figures have been compiled on the total percentage of convictions obtained in obscenity proceedings. This approximation by the author is based on 15 years of obscenity law enforcement experience. As Assistant Prosecutor in Cleveland, the author obtained more than 400 convictions for pandering obscenity and authored over 100 appeal briefs in obscenity cases. As General Counsel with Citizens for Decency Through Law, the author for 10 years has travelled the country conducting workshops for police and prosecutors on the prosecution of obscenity and has assisted in dozens of obscenity trials and appeals throughout the United States. In all, this author has tried over 65 obscenity jury cases in several states and has argued over 50 appeals before the Ohio Court of Appeals, the Ohio and Colorado Supreme Courts, United States Courts of Appeals for the Sixth and Ninth Circuits, and the United States Supreme Court. See *Flynt v. Ohio*, 451 U.S. 619 (1981), *dismissing cert. after oral argument in State v. Flynt*, 63 Ohio St. 2d 132, 407 N.E.2d 15 (1980); *Turoso v. Cleveland Mun. Court*, 674 F.2d 486 (6th Cir. 1982), *cert. denied*, 459 U.S. 880 (1982); *Sovereign News Co. v. Falke*, 674 F.2d 484 (6th Cir. 1982), *cert. denied* 459 U.S. 864 (1982); *People v. New Horizons, Inc.*, 200 Colo. 377, 616 P.2d 106 (1980); *State v. Burgun*, 56 Ohio St. 2d 354, 384 N.E.2d 255 (1978). This firsthand experience puts the author in a unique position to comment on the success of obscenity prosecutions nationwide. For a discussion of the effect of *Miller v. California*, 413 U.S. 15 (1973), on the number of obscenity prosecutions, see Project, *An Empirical Inquiry into the Effects of Miller v. California on the Control of Obscenity*, 52 N.Y.U. L. REV. 810 (1977).

14. See *The Pornography Industry*, Boston Globe, Feb. 13-18, 1983.

15. See COMMISSION ON OBSCENITY & PORNOGRAPHY, THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 7-21 (1970) [hereinafter OBSCENITY REPORT].

16. *The Pornography Industry*, *supra* note 14. Compare OBSCENITY REPORT, *supra* note 15, at 7-21 with 1 COMM'N ON PORNOGRAPHY, *supra* note 3, at 277.

"In sixteen years there have been numerous changes in the social, political, legal, cultural, and religious portrait of the United States, and many of these changes have undeniably involved both sexuality and the public portrayal of sexuality. With reference to the question of pornography, therefore, there can be no doubt that we confront a different world than that confronted by the 1970 Commission.

1 COMM'N ON PORNOGRAPHY, *supra* note 3, at 226.

17. *The Pornography Industry*, *supra* note 14.

"adult" bookstores and theatres. Video store owners sell the same illegal product as "adult" bookstores and theatre owners sell, however, and therefore video store owners must be prosecuted. But "Mom and Pop" video store owners and employees have a better public image and are more sympathetic defendants. They present a different trial problem for prosecutors than "adult" bookstore employees, whom the public generally perceives as sleazy. Law enforcement efforts must, however, continue to focus on the obscene material itself, rather than on the salespersons.

Today's "adult" videos are the same hard-core films previously available only in the industry's own bookstores and theatres. As the Supreme Court stated in *Miller v. California*, what was euphemistically called "adult" material in that case included magazines and a film "very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed."<sup>18</sup> The materials at issue in Orange County, California, in the *Miller* case were examples of hard-core pornography that state and federal courts historically have condemned as obscene and unprotected by the first amendment. This same hard-core pornography is what is usually meant by the marketing term "adult."

Because obscenity enforcement has never been consistent enough to force the pornography syndicates out of business or back underground, video dealers are misled into believing, or at least acting as if they believe, that the hard-core "adult" business is legal. The Attorney General's Commission on Pornography in 1986 criticized both federal and local prosecutors for letting the problem get out of control and urged local and federal enforcement as the legal solution to the problem of hard-core pornography.<sup>19</sup> If United States Attorneys and state and local prosecutors bring strong cases under present laws, the entire hard-core "adult" industry will be shown to be regularly engaged in illegal traffic in obscenity.

The Supreme Court consistently and forcefully has repeated that the "crass commercial exploitation of sex"<sup>20</sup> is a matter of grave concern and a legitimate target of state and federal criminal and civil laws and treaties.<sup>21</sup> In *Paris Adult Theatre I v. Slaton*,<sup>22</sup> the Court set out its rebuttal to the industry's argument

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18. *Miller v. California*, 413 U.S. 15, 18 (1973).

19. 1 COMM'N ON PORNOGRAPHY, *supra* note 3, at 366-75.

20. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973).

21. *Miller*, 413 U.S. at 18-19.

22. 413 U.S. 49 (1973).

that sexually explicit material should not be regulated for consenting adults without empirical proof of conclusive harm. The Court pointed out that "the primary requirements of decency may be enforced against obscene publications"<sup>23</sup> and that there is "at least an arguable correlation between obscene material and crime."<sup>24</sup> The Court ruled that "legitimate state interests" were at stake in slowing the tide of commercialized obscenity: "Rights and interests 'other than those of the advocates are involved.' These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself."<sup>25</sup>

## II. THE CURRENT LEGAL STANDARD FOR OBSCENITY

The relative uniformity of federal and state obscenity statutes provides an advantage to law enforcement officials. In *Miller*, the Court formulated a test designed to provide "concrete guidelines to isolate 'hard-core' pornography from expression protected by the First Amendment" in an "attempt to provide positive guidance to federal and state courts alike."<sup>26</sup> *Miller* held that material is obscene and unprotected by the first amendment if all three of the following conditions are met:

- a) . . . "the average person, applying contemporary community standards," would find that the work, taken as a whole, appeals to the prurient interest; b) . . . the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and c) . . . the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>27</sup>

In *Miller*, the Court revised the old "*Roth-Memoirs*" test,<sup>28</sup> removing the obligation of prosecutors "to prove a negative, i.e.,

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23. *Id.* at 57 (quoting *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 440 (1957)).

24. *Id.* at 58.

25. *Id.* (citation omitted).

26. *Miller v. California*, 413 U.S. 15, 29 (1973).

27. *Id.* at 24 (citations omitted).

28. In 1957, the Court first set forth the test for obscenity as "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Roth v. United States*, 354 U.S. 476, 489 (1957). In 1966, the Court added to the *Roth* test and extended the greatest protection ever to sexually explicit material by forcing the prosecution to prove that material is "utterly without redeeming social value." *A Book Named "John Cleland's Memoirs of a*

that the material was 'utterly without redeeming social value'—a burden virtually impossible to discharge under our criminal standards of proof."<sup>29</sup> The majority of the Court in *Miller* reached agreement on a test for obscenity for the first time since 1957, and in departing from *Memoirs*, the Court reembraced *Roth*.<sup>30</sup>

On the same day the Supreme Court decided *Miller*, the Court held that the *Miller* test would be applied to federal, as well as state, legislation.<sup>31</sup> One year later, in *Hamling v. United States*, the Court upheld and construed the federal mailing statute "to be limited to material such as that described in *Miller*."<sup>32</sup> In 1978, the Court noted that its construction of the mailing statute in *Hamling* was a "holding that the statute's coverage is limited to obscenity,"<sup>33</sup> even though the broadcast statute at issue in *FCC v. Pacifica Foundation* was not limited to the "obscene" and retained a separate prohibition against "indecenty" (the second prong of the *Miller* test).<sup>34</sup> The Court has made clear in other cases that *Miller*'s guidelines apply to all federal laws except broadcast and telephone indecenty.<sup>35</sup>

The response of the states was far more tortured. Because federal courts cannot authoritatively construe state legislation,<sup>36</sup> the Supreme Court in *Miller* explicitly invited state courts to interpret and save existing pre-*Miller* laws by engrafting the *Miller* test onto the statutes, rather than striking down the statutes and requiring the enactment of the *Miller* test by legislation.<sup>37</sup> Following *Miller*, the states either construed their statutes to

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Woman of Pleasure" v. Attorney General, 383 U.S. 413, 419 (1966) (emphasis in original).

29. *Miller*, 413 U.S. at 22; see also *Hamling v. United States*, 418 U.S. 87, 116 (1974).

30. *Miller*, 413 U.S. at 29, 36; *Memoirs*, 383 U.S. 413; see *Roth*, 354 U.S. 476; see also *Marks v. United States*, 430 U.S. 188, 192-94 (1977).

31. *United States v. 12 200-ft. Reels of Super 8mm. Film*, 413 U.S. 123, 129-30 (1973).

32. 418 U.S. 87, 115 (1974).

33. *FCC v. Pacifica Found.*, 438 U.S. 726, 740 (1978).

34. *Id.*, at 740-41, 743.

35. See *Pinkus v. United States*, 436 U.S. 293 (1978); *Smith v. United States*, 431 U.S. 291 (1977); *Marks v. United States*, 430 U.S. 188 (1977); *United States v. Orito*, 413 U.S. 139 (1973).

36. *United States v. Thirty-seven (37) Photographs*, 402 U.S. 363, 369 (1971) ("We lack jurisdiction authoritatively to construe state legislation."); *United States v. 12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123, 130 n.7 (1973).

37. "If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary." *Miller v. California*, 413 U.S. 15, 25 (1973).



adopt all or most of *Miller* or declared them invalid and left revision to the legislatures.<sup>38</sup> The process has been continuing since 1973, but at present all state obscenity laws have the *Miller* test in effect.<sup>39</sup>

In *Miller*, the Supreme Court announced for the first time a definitive test for determining obscenity and gave "a few plain examples" of the type of hard-core sexual conduct that can be found patently offensive under state and federal law.<sup>40</sup> This test has not changed. The only significant further explanation of the test is found in *Smith v. United States*.<sup>41</sup> In that case, the Court clarified that patent offensiveness and prurient appeal were questions of fact to be determined by the hypothetical average person applying contemporary community standards.<sup>42</sup> *Pope v. Illinois*<sup>43</sup> verified what was implicit after *Smith*—that the third prong of the *Miller* test (whether the material has serious literary, artistic, political, or scientific value) is to be judged according to the reasonable person standard, rather than by contemporary community standards.<sup>44</sup>

Although the test for obscenity has not changed, a number of United States Supreme Court and lower court cases have fleshed out the meaning of various words and phrases used by the *Miller* Court. A detailed discussion of the terms used in the *Miller* test is necessary to an understanding of the current legal standard for obscenity. Readers should be mindful, however, that definitions and jury instructions vary from jurisdiction to jurisdiction. The following definitions are adapted from and supported by decisions of the United States Supreme Court.

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38. See Taylor, *Pornography and the First Amendment*, in CRIMINAL JUSTICE REFORM 156-57 (1983).

39. Only Vermont and Alaska have no adult obscenity statutes of any kind. Maine, New Mexico, South Dakota, West Virginia, and Montana allow local obscenity ordinances. See, e.g., *City of Portland v. Jacobsky*, 496 A.2d 646, 648 (Me. 1985); N.M. STAT. ANN. § 30-38-2 (1978); S.D. CODIFIED LAWS ANN. § 22-24-27 (10) (1988); W. VA. CODE § 7-1-4(4) (1984); MONT. CODE ANN. § 45-8-201 (1985). Obscenity statutes in Oregon and Hawaii were struck down on state constitutional grounds. In *State v. Henry*, 302 Or. 510, 732 P.2d 9 (1987), the Oregon Supreme Court ruled that obscenity is protected speech under the Oregon Constitution. In *State v. Kam*, 748 P.2d 372 (1988), the Hawaii Supreme Court held Hawaii's obscenity laws violative of the right to privacy created by the state constitution.

40. *Miller*, 413 U.S. at 25.

41. 431 U.S. 291 (1977).

42. *Id.* at 301-02, 309.

43. 107 S.Ct. 1918 (1987).

44. *Id.* at 1919.

### A. *The Average Person*

*Smith* made clear that prurient appeal and patent offensiveness were to be judged by the average person applying "contemporary community standards."<sup>45</sup> In *Pinkus v. United States*, the Court explained that the jury's duty was to "determine the collective view of the community, as best as it can be done."<sup>46</sup> The Court also held that it was the adult community that was to be considered.<sup>47</sup> Many cases have held that obscenity is not to be determined only by its effect on a "sensitive," "insensitive," "prudish," or "tolerant" person but also by its effect on the "average" person who represents the synthesis of the entire adult community.<sup>48</sup>

### B. *Contemporary Community Standards*

In an obscenity trial, the United States Supreme Court requires the fact-finder to determine whether the average person would consider certain material prurient and patently offensive, using contemporary community standards as the measuring stick. As stated in *Smith*, "community standards simply provide the measure against which the jury decides the questions of appeal to prurient interest and patent offensiveness."<sup>49</sup> A juror is allowed to draw on personal knowledge of the views of the average person in the juror's own community, "just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law."<sup>50</sup>

That the geographical area comprising the community need not be national, or even statewide, is evident. The preferred area is that from which the jury is drawn, in order to allow jurors as much freedom from confusion as possible. *Miller* sought to minimize the jury's need to deal with an abstract formulation, by allowing less than a national standard.<sup>51</sup> As explained in *Hamling*: "Our holding in *Miller* that California could constitution-

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45. *Smith v. United States*, 431 U.S. 293, 302 (1978).

46. 436 U.S. 293, 301 (1978).

47. *Id.* at 298-300.

48. See *id.* at 303 (1977); *Miller v. California*, 413 U.S. 15, 30, 33 (1973); *Roth v. United States*, 354 U.S. 476, 489-90 (1957); see also F. SCHAUER, *THE LAW OF OBSCENITY* 69-77 (1976).

49. 431 U.S. at 302.

50. *Hamling v. United States*, 418 U.S. 87, 104-05 (1974).

51. *Miller*, 413 U.S. at 30-32.

ally proscribe obscenity in terms of a 'statewide' standard did not mean that any such precise geographic area is required as a matter of constitutional law."<sup>52</sup>

In *Jenkins v. Georgia*,<sup>53</sup> the Court approved a charge that did not specify any geographical size for the community, noting that "the States have considerable latitude in framing statutes under this element of the *Miller* decision."<sup>54</sup> The Court held that statutes that define "community" as a precise geographic area are just as valid as those that define "community" as statewide and those that do not define community at all.<sup>55</sup> In *Hamling*, however, the Court suggested that the best approach is to use the area the jury is drawn from as the geographical "community."<sup>56</sup> The Court also held that using the local vicinage as the relevant community would not preclude the jury from receiving relevant evidence on standards statewide or in other parts of the country.<sup>57</sup> *Pinkus* provided that children are not to be considered part of the "community" when applying contemporary standards and that "the community includes all adults who constitute it, and a jury can consider them all in determining relevant community standards."<sup>58</sup>

### C. Expert Testimony

In *Paris Adult Theatre I v. Slaton*,<sup>59</sup> the Court held that once the allegedly obscene material is placed in evidence, the jury can decide all facets of the test based on its own knowledge, without the need for expert testimony. The Court ruled it was not error "to fail to require 'expert' affirmative evidence that the materials were obscene when the materials themselves were actually placed in evidence. The films, obviously, are the best evidence of what they represent."<sup>60</sup> The Court in *Kaplan v. California*<sup>61</sup> stated that there was no "constitutional need for 'expert' testimony on behalf of the prosecution, or for any other ancillary evi-

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52. 418 U.S. at 105.

53. 418 U.S. 153 (1974).

54. *Id.* at 157.

55. *Id.*

56. *Hamling v. United States*, 418 U.S. 87, 105-06 (1974).

57. *Id.* at 105-06.

58. *Pinkus v. United States*, 436 U.S. 293, 298, 300 (1978).

59. 413 U.S. 49 (1973).

60. *Id.* at 56 (citations omitted).

61. 413 U.S. 115 (1973).

dence of obscenity, once the allegedly obscene material itself is placed in evidence."<sup>62</sup>

Limitations on the admissibility of evidence lie in the broad discretion of the trial court. In *Hamling v. United States*,<sup>63</sup> the Court upheld rulings excluding comparables (similar sexually explicit material available nearby), expert witnesses, and other evidence.

#### D. Appeal to Prurient Interest

The Model Penal Code definition approved by the Court in *Roth v. United States* defines "prurient interest" in part as a "shameful or morbid interest in nudity, sex, or excretion."<sup>64</sup> The Court referred to obscene material as that "which deals with sex in a manner appealing to prurient interest,"<sup>65</sup> meaning "material having tendency to excite lustful thoughts."<sup>66</sup> The Court also saw "no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I. Model Penal Code."<sup>67</sup> In *Mishkin*,<sup>68</sup> *Hamling*,<sup>69</sup> and *Pinkus*,<sup>70</sup> the Court made clear that when material is intended to stimulate a specific deviant group or a specific deviant sexual interest, the prurient interest test is satisfied if jurors find that the material appeals to the prurient interest of the intended and probable deviant group.

In *Mutual Film Corp. v. Industrial Comm'n*,<sup>71</sup> the Court made a general observation about the appeal of pornography to normal persons, which was cited with approval in footnote twenty of *Roth*.<sup>72</sup> "They take their attraction from the general interest, eager and wholesome it may be, in their subjects, but a prurient interest may be excited and appealed to."<sup>73</sup> In a later

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62. *Id.* at 121.

63. 418 U.S. 87, 124-27 (1974).

64. 354 U.S. 476, 487 n.20 (1957) (quoting Model Penal Code § 207.10(2) (Tentative Draft No. 6 1957)).

65. *Id.* at 487.

66. *Id.* at 487 n.20.

67. *Id.*

68. *Mishkin v. New York*, 383 U.S. 502, 508 (1966).

69. *Hamling v. United States*, 418 U.S. 87, 127-30 (1974).

70. *Pinkus v. United States*, 436 U.S. 293, 301-03 (1978).

71. 236 U.S. 230 (1915).

72. *Roth v. United States*, 354 U.S. 476, 487 n.20 (1957).

73. *Mutual Film*, 236 U.S. at 242.

case, the Court characterized this trait as "the widespread weakness for titillation by pornography."<sup>74</sup>

The Supreme Court has used various descriptive words to define "prurient." Material can be prurient when it either attracts or repulses.<sup>75</sup> Material that may be attractive or erotic, even to the average person, has been held to be obscene.<sup>76</sup> Bizarre material, repulsive to the average person, also has been found obscene.<sup>77</sup> Prurient appeal is properly a synthesis of all the considerations that describe an interest in sex for its own sake or for commercial gain.<sup>78</sup>

The Court has chosen its wording carefully to avoid the problems of the old "Hicklin Rule,"<sup>79</sup> which judged obscenity solely by its impact on the young or sensitive. In *Miller*, the Court stated that the guideline is "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest."<sup>80</sup> In *Roth*, the Court asked "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."<sup>81</sup> In *Miller*, the Court also said that "triers of fact are asked to decide whether 'the average person, applying contemporary community standards' would consider certain materials 'prurient.'"<sup>82</sup>

The Court in *Miller* did not say that the fact-finder was to decide whether the matter appealed only to the shameful or morbid interest of an average person applying contemporary

74. *Ginzburg v. United States*, 383 U.S. 463, 471 (1966).

75. *Mishkin v. New York*, 383 U.S. 502, 508 (1966); see also *Roth*, 354 U.S. 476 (quoting Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669, 677 (1963)).

76. *Hamling v. United States*, 418 U.S. 87 (1984); *Ginzburg*, 383 U.S. 463; see also *Penthouse Int'l v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980); *United States v. Obscene Printed Matter*, 668 F. Supp. 50 (D. Mass. 1987); *Penthouse Int'l v. Webb*, 594 F. Supp. 1186 (N.D. Ga. 1984); *United States v. Various Articles of Obscene Merchandise*, 536 F. Supp. 50 (S.D.N.Y. 1981); *State v. Triplett*, 722 S.W.2d 633 (Mo. Ct. App. 1986); *Flynt v. State*, 153 Ga. App. 232, 264 S.E.2d 669 (1980), cert. denied, 449 U.S. 888 (1980); *City of Belleville v. Morgan*, 60 Ill. App. 3d 434, 376 N.E.2d 704 (1978).

77. *Ward v. Illinois*, 431 U.S. 767 (1977); *Mishkin*, 383 U.S. at 502, 505; *United States v. Guglielmi*, 819 F.2d 451 (4th Cir. 1987).

78. See F. SCHAUER, *supra* note 48, at 96-102; MODEL PENAL CODE § 251.4 commentaries at 488-94 (Official Code and Revised Comments 1980).

79. The "Hicklin Rule" is derived from the English case of *Regina v. Hicklin*, 3 L.R.-Q.B. 360 (1868), in which the test for obscenity was "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

80. *Miller v. California*, 413 U.S. 15, 24 (1973) (emphasis added).

81. *Roth v. United States*, 354 U.S. 476, 489 (1957) (emphasis added).

82. 413 U.S. at 30 (emphasis added).

community standards. Rather, it required the fact-finder to determine whether the average person, applying those standards, would find the appeal directed to the prurient interest. This subtle distinction is important. If a judge charges a jury that it must find the material obscene only if the material appeals to or excites a shameful or morbid interest in an average person or in the jury, confusion can result, and the purpose of obscenity law—to distinguish illegal from protected material—would be thwarted.<sup>83</sup>

### *E. Serious Value and Pandering*

*Pope v. Illinois* verified that the third prong of the *Miller* test is to be judged by the reasonable person standard, rather than by contemporary community standards, and held that the issue of whether the material has serious literary, artistic, political, or scientific value is not limited to the individual community, but is based on an objective standard.<sup>84</sup> The judge and jury can still use their own “knowledge of the propensities of a ‘reasonable’ person” to determine objective value without reference to the community, and without the need for expert testimony, as they do to determine prurience and offensiveness within the reference of community standards.<sup>85</sup>

Whether the material is promoted or “pandered” as sexually explicit material is relevant to the determination of whether the material has serious value. The Court referred to this as “the sordid business of pandering—‘the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers.’”<sup>86</sup> The Court has ruled that “evidence of pandering to prurient interests in the creation, promotion, or dissemination of material is relevant in determining whether the material is obscene.”<sup>87</sup> Evidence of pandering can be used to rebut allegations that the material has serious value.<sup>88</sup>

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83. *United States v. Guglielmi*, 819 F.2d 451, 455 (4th Cir. 1987); Fahringer, *The Defense of an Obscenity Prosecution*, TRIAL, May 1978, at 32.

84. 107 S. Ct. 1918 (1987).

85. See also *Smith v. United States*, 431 U.S. 291, 301 (1977); F. SCHAUER, *supra* note 48, at 123-24.

86. *Ginzburg v. United States*, 383 U.S. 463, 467-68 (1966) (quoting *Roth*, 354 U.S. at 495-96 (Warren, C.J., concurring)).

87. *Splawn v. California*, 431 U.S. 595, 598 (1977).

88. *Id.*; see also *Pinkus v. United States*, 436 U.S. 293, 303-04 (1978); *Hamling v. United States*, 418 U.S. 87, 130 (1974).

### F. Patently Offensive Sexual Conduct

In *Miller*, the Court offered examples of the type of "sexual conduct" that needed to be defined by state statute, making clear that states were not limited to those examples.<sup>89</sup> The Court stated that it was not limiting the states but only offering examples. In *Ward v. Illinois*,<sup>90</sup> the Court approved the inclusion of bestiality and sadomasochism as examples of sexual conduct in a state statute. The Court held that notice was provided by the descriptions of flagellation, homosexuality, oral contact, and intercourse included in Illinois law by the Illinois Supreme Court.<sup>91</sup>

The concept of patent offensiveness can be found in the definition of obscene in the Model Penal Code as "substantially beyond customary limits of candor in describing or representing such matters,"<sup>92</sup> a definition based on Judge Learned Hand's definition of "obscene" in *United States v. Kennerly*.<sup>93</sup> This language later reappeared in Justice Brennan's opinion in *Jacobellis v. Ohio*,<sup>94</sup> which also approved of Justice Harlan's statement that, to be "patently offensive" or "indecent," materials should be "so offensive on their face as to affront current community standards of decency."<sup>95</sup> Justice Brennan referred to this as "a deviation from society's standards of decency."<sup>96</sup>

Whether material is "patently offensive" to contemporary community standards should be determined by what is "accepted" in that community, not what is merely "tolerated." In *Smith v. United States*, the Court affirmed a conviction and approved the jury instruction "that contemporary community standards were set by what is in fact *accepted* in the community as a whole."<sup>97</sup> In *Miller*, the Court stated that "[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi *accept* public depiction of conduct found *tolerable* in Las Vegas, or New York City."<sup>98</sup>

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89. *Miller v. California*, 413 U.S. 15, 25 (1973).

90. 431 U.S. 767, 773 (1977).

91. *Id.* at 771-73.

92. MODEL PENAL CODE § 251.4 commentaries at 492 (Official Code and Revised Comments 1980); see also F. SCHAUER, *supra* note 48, at 102-05.

93. 209 F. 119, 121 (S.D.N.Y. 1913).

94. 378 U.S. 184, 191 (1964).

95. *Manual Enters. v. Day*, 370 U.S. 478, 482 (1962).

96. *Jacobellis*, 378 U.S. at 192.

97. 431 U.S. 291, 297-98 (1977) (emphasis added).

98. *Miller v. California*, 413 U.S. 15, 32 (1973) (emphasis added).

The Court has employed this concept of community acceptance in its decisions on patent offensiveness since *Roth*.<sup>99</sup> Most recently, in *FCC v. Pacifica Foundation*, the Court held that the normal definition of "indecent" referred to "nonconformance with accepted standards of morality."<sup>100</sup> The Court also noted that Justice Harlan used "indecent" as a shorthand term for "patent offensiveness" and that the FCC similarly defined "indecent" in the case before it.<sup>101</sup>

In *Sedelbauer v. State*, the Indiana Supreme Court approved the use of the word "acceptance" in the application of community standards to patent offensiveness, ruling that "the trial court did not err in using the word 'accept' in giving instructions to the jury rather than the word 'tolerate' as requested by the defendant."<sup>102</sup> Courts also have disallowed or restricted the use of "comparables" as evidence that community standards of patent offensiveness have not been violated, unless a proper foundation showing similarity and acceptance is met.<sup>103</sup> The Court, in *Hamling*, followed the Second Circuit's decision that "[m]ere availability of similar material by itself means nothing more than that other persons are engaged in similar activities."<sup>104</sup>

### III. THE NEED FOR A PER SE HARD-CORE PORNOGRAPHY RULE

Several factors contribute to the inconsistency surrounding the enforcement of obscenity laws in state and local jurisdictions. This inconsistency could be remedied by the adoption of a per se rule mandating that all commercial hard-core pornography be recognized as illegal.

First, state court interpretations of their obscenity laws will generally be upheld by the United States Supreme Court, which

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99. See *Smith*, 431 U.S. 291; *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Miller*, 413 U.S. 15; *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. Attorney General, 383 U.S. 413 (1966); *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

100. 438 U.S. 726, 740 (1978).

101. *Id.* at 740 n.15.

102. *Sedelbauer v. State*, 428 N.E.2d 206, 211 (Ind. 1981), *cert. denied*, 455 U.S. 1035 (1982).

103. See *United States v. Battista*, 646 F.2d 237, 245 (6th Cir.), *cert. denied*, 454 U.S. 1046 (1981); *United States v. Womack*, 509 F.2d 368, 375-81 (D.C. Cir. 1974), *cert. denied*, 422 U.S. 1022 (1975); *Womack v. United States*, 294 F.2d 204, 206 (D.C. Cir.), *cert. denied*, 365 U.S. 859 (1961); *Flynt v. State*, 154 Ga. App. 232, 264 S.E.2d 669, 673-78, *cert. denied*, 449 U.S. 888 (1980); *Long v. 130 Market Street Gift & Novelty*, 294 Pa. Super. 383, 440 A.2d 517, 521 (1982).

104. *Hamling v. United States*, 418 U.S. 87, 126 (quoting *United States v. Manarite*, 448 F.2d 583, 593 (2d Cir. 1971)).



considers itself, and all federal courts, "bound" by such interpretations.<sup>105</sup> Federal courts can only declare state laws valid or invalid and declare whether any invalid provision or interpretation is severable.<sup>106</sup> Thus, state courts retain control to construe and enforce state laws.<sup>107</sup>

Second, differences in penalty schemes in various jurisdictions,<sup>108</sup> and the availability of several possible causes of action (i.e., criminal, civil nuisance, injunction, declaratory judgment, racketeering, and organized crime)<sup>109</sup> pose further complications. These choices create variations in the effectiveness of prosecutions from state to state.

Despite these two problems, if an obscenity case is tried in any of the ninety-four federal districts or within the forty-six states with active statutes or ordinances,<sup>110</sup> the same basic guidelines are used to determine obscenity. Nevertheless, the issues become substantially confused because jury instructions differ dramatically in their explanation of the terms used in the *Miller* test, as can the definitions used by trial judges. State courts, as well as federal courts, retain wide latitude in defining legal terms and drafting jury instructions. This effectively changes application of the law from jurisdiction to jurisdiction

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105. See *Ward v. Illinois*, 431 U.S. 767, 772-73 (1977); *Mishkin v. New York*, 383 U.S. 502, 507-08, 510-11 (1966); *Kingsley Int'l Pictures v. Regents*, 360 U.S. 684, 688 (1959); see also *Guaranty Trust v. Blodgett*, 287 U.S. 509, 513 (1933) (accepting state court interpretation of tax law as binding on Supreme Court).

106. See *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985); *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 521 n.26 (1981); *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 369 (1971); *Dombrowski v. Pfister*, 380 U.S. 479, 491 (1965); see also *McCarthy v. Briscoe*, 553 F.2d 1005, 1007 (5th Cir. 1977).

107. See *Turoso v. Cleveland Mun. Court*, 674 F.2d 486 (6th Cir. 1982); *Sovereign News Co. v. Falke*, 674 F.2d 484 (6th Cir. 1982); *Sovereign News Co. v. Falke*, 448 F. Supp. 306 (N.D. Ohio 1977); *State v. Burgun*, 56 Ohio St. 2d 354, 384 N.E.2d 255 (1978); see also *Hicks v. Miranda*, 422 U.S. 332, 339-40, 343-46 (1975); *Miller v. California*, 418 U.S. 915 (1974) (*Miller II*); *Miller v. California*, 413 U.S. 15 (1973) (*Miller I*); *Hoover v. Byrd*, 801 F.2d 740 (5th Cir. 1986); *Red Bluff Drive-In v. Vance*, 648 F.2d 1020 (5th Cir. 1981); *People v. Geever*, 122 Ill. 2d 313, 522 N.E.2d 1200 (1988); *Andrews v. State*, 652 S.W.2d 370 (Tex. Crim. App. 1983); *People v. Enskat*, 33 Cal. App. 3d 900, 109 Cal. Rptr. 433 (1973).

108. *E.g.*, *Polykoff v. Collins*, 816 F.2d 1326, 1337-40 (9th Cir. 1987) (upholding Arizona's felony fine provision for up to \$1 million); *511 Detroit Street, Inc. v. Kelley*, 807 F.2d 1293, 1298-99 (6th Cir. 1986) (upholding Michigan's felony fine provision for up to \$5 million).

109. *E.g.*, *United States v. Thevis*, 665 F.2d 616 (5th Cir. 1982) (criminal RICO); *State v. Anderson*, 322 N.C. 22, 366 S.E.2d 459 (1988) (criminal); *4447 Corp. v. Goldsmith*, 504 N.E.2d 559 (Ind. 1987) (Indiana RICO); *State ex rel. Kidwell v. U.S. Marketing, Inc.*, 102 Idaho 451, 631 P.2d 622 (1981), *app. dismissed*, 455 U.S. 1009 (1982) (civil nuisance); *People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater*, 101 Cal. App. 3d 296, 161 Cal. Rptr. 562 (1980) (civil injunction).

110. See *supra* note 39.

and proves a hindrance to law enforcement. The *Miller* test is fairly simple to state and debate. However, after the judge adds several pages of explanations as to what "average person," "contemporary community standards," "prurient," "patently offensive," and "serious value" mean, the prosecutor's argument and the trier of fact's decision become much more difficult.

This morass of conflicting definitions can discourage prosecutors from bringing obscenity cases to trial and can confuse jurors, causing deadlocked and hung juries, and acquittals on material that is clearly obscene.<sup>111</sup> The United States Supreme Court should end this confusion by ruling on a comprehensive series of issues to clarify how the test should be applied and how the terms in *Miller* should be read.

Congress and the states could help the public and the courts by passing supplementary statutes that prohibit illegal material in an objective, per se manner.<sup>112</sup> Such an approach would provide at least one major degree of uniformity to complement the application of the obscenity test. A simple prohibition of hardcore pornography would provide a benchmark by which to slow commercial trafficking in human flesh—at least by removing filmed acts of prostitution. Filmed or photographed acts of actual sexual intercourse would be prohibited, but simulations or suggestions of sex would not be outlawed by the per se rule. The existing *Miller* laws could be used, along with the pandering rule,<sup>113</sup> to prosecute or enjoin simulated depictions of sex that are still considered obscene because of their prurient appeal, offensiveness, and lack of serious value. Where films or photos visibly display penetration, however, their commercial distribution would be forbidden.

The Attorney General's Commission resisted recommending a per se approach, favoring instead the full enforcement of existing, tested laws.<sup>114</sup> The Commission was correct in holding that *Miller* is enforceable, but the Commission's frustration with lack of enforcement is the very problem addressed by a more limited rule than *Miller* for films or photographs of actual sex acts that are nothing more than filmed or photographed acts of prostitution. This per se proposal would not conflict with *Miller*

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111. 1 COMM'N ON PORNOGRAPHY, *supra* note 3, at 460; Project, *supra* note 10, at 895-96, 910-28.

112. This writer first proposed a per se definition of obscenity in 1983. Taylor, *supra* note 38. See also Milligan, *Obscenity: Malum in Se or Only in Context? The Supreme Court's Long Ordeal*, 7 CAP. U.L. REV. 631, 643-45 (1978).

113. Taylor, *supra* note 38, at 159.

114. 1 COMM'N ON PORNOGRAPHY, *supra* note 3, at 364-66.

because the proposal would reach less material than the *Miller* test, but it would make prosecution easier for the material *Miller* always reaches—the hardest of hard-core pornography: actual intercourse or ejaculation occurring in front of a camera for commercial exploitation.

#### IV. THE HARD-CORE PORNOGRAPHY RULE

The proposed new statute or ordinance should be simple and could read:

No person with knowledge of the character of the material shall knowingly distribute or exhibit, to the public or for commercial purposes, any hard-core pornography.

Hard-core pornography means any material or performance that explicitly depicts ultimate sexual acts, including vaginal or anal intercourse, fellatio, cunnilingus, analingus, and masturbation, where penetration, manipulation, or ejaculation of the genitals is clearly visible.

Congress and state legislatures should make the statute applicable to importation, interstate shipment, mailing, public dissemination, and commercial distribution. The law should also provide an affirmative defense for bona fide scientific, educational, or research purposes, and/or provide an exception for serious literary, artistic, political, or scientific uses. Under such a scheme, only the commercial pandering of explicit sex would be prohibited.

As used by the Supreme Court and lower courts since 1957, the phrase "hard-core pornography" has become as much a legal term of art as the word "obscene."<sup>115</sup> Unlike obscenity, however, the definition of hard-core pornography has not changed over the years. It has always referred to visual materials that show explicit sexual acts. The trade term for hard-core pornography is PCV—"penetration clearly visible." The Supreme Court has historically struggled with developing a test for obscenity, but the majority has always seemed to agree on the illegality of "hard-core pornography."<sup>116</sup> The *Miller* test, like the *Roth* test, allows

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115. See *Hamling v. United States*, 418 U.S. 87, 118 (1974). "[T]he word 'obscene' . . . is not merely a generic or descriptive term, but a legal term of art." *Id.*

116. In announcing the obscenity test, Chief Justice Burger wrote: "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core'

material to be found obscene even if it is not hard-core pornography, because the sex may be "simulated."

In *Roth*, the materials arguably were not hard-core pornography<sup>117</sup> because they were not explicit. Justice Harlan, in his concurrence in the companion state case to *Roth*, *Alberts v. California*, argued that the state conviction should be upheld because states should have more freedom to regulate pornographic materials.<sup>118</sup> But Harlan thought Roth's federal case should be dismissed, because the federal government should only be allowed to criminalize "hard-core pornography."<sup>119</sup> Justice Harlan repeated this contention in 1962 when he argued that the federal government should not be allowed to prohibit mailings of mere nudity, which were not "hard-core."<sup>120</sup>

In 1966, a majority of the Court recognized that hard-core material is clearly obscene, but that the *Roth* test also reaches material that is not as explicit as hard-core pornography. In *Mishkin v. New York*, the Court noted that New York's decision to criminalize only hard-core pornography meant that its "definition of obscenity is more stringent than the *Roth* definition," reaching "a narrower class of conduct," and therefore, "the judgment that the constitutional criteria are satisfied is implicit in the application of [New York's law]."<sup>121</sup>

In *Miller*, the Court made clear that more than just hard-core pornography could be outlawed, giving examples of material that states could constitutionally prohibit, including "simulated" descriptions of sex acts and "lewd exhibition of the genitals,"<sup>122</sup> neither of which constitutes hard-core pornography. Had the Court followed Justice Harlan's view, it would have limited the *Miller* test to actual depictions of ultimate sex acts. Such a limitation on law enforcement would have provided the federal government and states with little protection against the increasingly explicit and deviant material turned out by the pornography industry. Much hard-core and obscene medium-core (simulated) materials would have gone unprosecuted. Such a hard-core limitation would have departed from *Roth* and from the previously discussed "pandering" concept, where materials that were not

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sexual conduct specifically defined by the regulating state law, as written or construed." *Miller v. California*, 413 U.S. 15, 27 (1973).

117. *Roth v. United States*, 354 U.S. 476, 508 (1957) (Harlan, J., dissenting).

118. 354 U.S. 476, 501-02 (Harlan, J., concurring).

119. 354 U.S. 476, 507 (Harlan, J., dissenting).

120. *Manual Enters. v. Day*, 370 U.S. 478, 489 (1962).

121. 383 U.S. 506, 508 (1966).

122. *Miller v. California*, 413 U.S. 15, 25 (1973).

hard-core (and, the Court notes, may not have been "obscene" standing alone) were held subject to conviction if the pornographer pandered them as if they were obscene and highly prurient.<sup>123</sup> The proposed hard-core rule would, therefore, be a supplement to existing obscenity laws, not a replacement.

There is a difference between hard-core sexual conduct, as used in *Miller*, and hard-core pornography. Hard-core conduct refers to types of sex—ultimate sexual acts and lewd exhibitions of the genitals—not to a type of material. Hard-core pornography refers to a way of depicting ultimate sexual acts, by explicitly depicting genital penetration or ejaculation. Hard-core conduct—the *Miller* examples—can be depicted in a hard-core way (PCV), a medium-core way (simulated), or even a soft-core way (posing of nudes with focus on genitals). These three kinds of pornography can all be found obscene under *Miller*,<sup>124</sup> but only if presented in a patently offensive way that appeals to the prurient interest and has no serious value.<sup>125</sup> The proposed hard-core rule would apply only to hard-core conduct depicted in a hard-core way—by penetration clearly visible.

The term "hard-core pornography," as used by the courts, includes actual and simulated sex and can even include written descriptions of ultimate sex acts. By limiting the proposed per se rule to that portion of hard-core pornography where penetration is clearly visible, the vagueness of the *Miller* test is avoided while the objectivity and constitutionality of this per se proposal is strengthened. The other types of hard-core pornography that depict simulated sex or describe graphic sex would be left to current obscenity laws under *Miller*, in order to allow for the application of the serious value and community standards tests.

Many researchers and much of the public agree that pornography involving children, violence (whether hard- or soft-core), and other degrading or bizarre acts is harmful and causes or contributes to antisocial and criminal behavior.<sup>126</sup> The United

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123. *Ginzburg v. United States*, 383 U.S. 463 (1966).

124. See e.g., *United States v. Battista*, 646 F.2d 237 (6th Cir.), cert. denied, 454 U.S. 1046 (1981) (holding obscene the hard-core film *Deep Throat*); *Penthouse Int'l v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980) (holding that lewd exhibition of the genitals in magazine pictorial met patent offensiveness test, and that *Penthouse* and *Oui* magazines were therefore obscene); *United States v. West Coast News*, 357 F.2d 855, 857 (6th Cir. 1966) (holding book titled *Sex Life of a Cop* "by any standard" to be obscene—"a writing so bad that no amount of sophisticated dialectics could absolve it from classification as 'hard-core'"); *State ex rel. Keating v. A Motion Picture Film Entitled "Vixen,"* 35 Ohio St. 2d 251, 301 N.E.2d 880 (1973) (holding obscene a film with simulated sex scenes).

125. *Miller*, 413 U.S. at 24-25.

126. See generally COMM'N ON PORNOGRAPHY, *supra* note 3.

States Supreme Court, however, has never required obscenity laws to be based on or limited by current research or the opinions of professors and doctors who may agree or disagree with present law.<sup>127</sup> The Court has been steadfast in allowing Congress and state legislatures to define the crime of obscenity, within the guidelines of the *Miller* test.<sup>128</sup>

Obviously, simulated and normal sexual acts and lewd exhibition of the genitals (even without conduct) are not hard-core pornography in the strict sense, even though they are types of hard-core sexual activities (as opposed to mere nudity and fondling). Yet these can be found obscene under the *Miller* test. It is implicit that if such hard-core types of sex are depicted in a hard-core fashion, then the material is clearly illegal and can be subject to criminal and civil penalties under federal and state statutes.

Under the *Miller* test, for example, the Fifth Circuit found issues of *Penthouse* and *Oui* magazines, but not *Playboy*, to be obscene.<sup>129</sup> Under Ohio law, the simulated sex movie "Vixen" was enjoined as obscene under the more restricted pre-*Miller* standard of *Roth*, then reaffirmed as obscene by the Ohio Supreme Court after the *Miller* standards were announced.<sup>130</sup> The court held that scenes of "purported acts of sexual intercourse" exhibited for "commercial exploitation" were obscene and unprotected by the Constitution.<sup>131</sup>

It is not open to debate that all explicit sexual material can be found obscene, and that nonexplicit, simulated material also can violate the *Miller* standards. That much the Supreme Court has made clear. Whether the theme or context of the sex is violent, consensual, degrading, or bizarre is an element only of how "patently offensive" the depiction is. For a finding of obscenity, the Court in *Miller* did not require patently offensive sexual acts, but rather sexual acts depicted in a patently offensive way. *Miller* requires an average person, applying contemporary community standards, to find that the work depicts or describes sexual conduct (such as ultimate sexual acts, normal or perverted, actual or simulated; masturbation; excretory functions; or lewd exhibition of the genitals) in a patently offensive way.<sup>132</sup> As

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127. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60-64 (1973).

128. *Id.* at 64-69.

129. Penthouse Int'l v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980).

130. State ex rel. Keating v. A Motion Picture Film Entitled "Vixen," 35 Ohio St. 2d 215, 301 N.E.2d 880 (1973).

131. *Id.* at 880, 882.

132. Miller v. California, 413 U.S. 15, 24-25 (1973).

made clear in *Mishkin* and in the cases sustained on appeal since *Miller*, these materials can include the violent<sup>133</sup> as well as non-violent,<sup>134</sup> the simulated,<sup>135</sup> and the so-called "soft-core" or "medium-core."<sup>136</sup>

Admittedly, this proposal for a per se hard-core statute would not reach to all the obscenity now prosecutable under present *Miller* laws. This proposal would, however, include the material that most of the individual Supreme Court Justices have agreed is illegal. Even Justice Stewart, concurring in *Memoirs* as he had dissented in *Ginzburg*, stated his view that "only hard-core pornography may be suppressed."<sup>137</sup> In *Roth*, the Court stated that obscenity can be prosecuted without harming the first amendment's protection "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."<sup>138</sup> But the Court added in *Miller* that "the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter."<sup>139</sup> This Article's hard-core proposal would take advantage of the clearest consensus in the field of obscenity law, and its implementation would eliminate most obviously illegal material.

Because state and federal law can reach materials that are not hard-core pornography, the courts have assumed that if the materials are indeed hard-core, their obscenity is clear as a matter of law. An underlying reason for courts to treat hard-core pornography as obscene per se is that its commercial production necessarily involves prostitution.<sup>140</sup> Convictions have been obtained and nuisance actions sustained where producers of hard-core pornography were apprehended in California and New York and charged with prostitution-related offenses.<sup>141</sup>

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133. See, e.g., *State v. Riggins*, 645 S.W.2d 113 (Mo. Ct. App. 1983); *State v. XNLT Corp.*, 536 S.W.2d 836 (Mo. Ct. App. 1976).

134. *United States v. Battista*, 646 F.2d 237 (6th Cir. 1981); see also 2 COMM'N ON PORNOGRAPHY, *supra* note 3, at 1745-80 (listing films held obscene).

135. *State ex rel. Keating v. A Motion Picture Film Entitled "Vixen,"* 35 Ohio St. 2d 215, 301 N.E.2d 880 (1973).

136. *Penthouse Int'l v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980).

137. *Marks v. United States*, 430 U.S. at 193 (1977) (citing *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*, 383 U.S. 413, 421 (1966)).

138. *Roth v. United States*, 354 U.S. at 476, 484 (1957).

139. *Miller v. California*, 413 U.S. 15, 35 (1973) (citing *Roth*, 354 U.S. at 496 (Warren, C.J., concurring)).

140. *State ex rel. Sensenbrenner v. Adult Book Store*, 26 Ohio App. 2d 183, 213, 271 N.E.2d 13, 31 (1971), *aff'd*, 35 Ohio St. 2d 220, 301 N.E.2d 695 (1973), *cert. denied*, 421 U.S. 934 (1975).

141. See *People ex rel. Van De Kamp v. American Art Enters.*, 124 Cal. App. 3d 1023, 177 Cal. Rptr. 776 (1981), *vacated on other grounds*, 33 Cal. 3d 328, 188 Cal. Rptr.

In one obscenity case, an Ohio appellate court noted, "It is highly improbable that some of the material herein involved could be prepared without acts of prostitution or sodomy."<sup>142</sup> The court recognized that "[i]nherent in the publication of pictorial pornography is the commission of acts . . . which are abhorrent to our national society, and are prohibited by the laws of almost all jurisdictions."<sup>143</sup>

The Court in *Mishkin* inferred that if a state limits its obscenity laws to hard-core pornography, then a finding of illegality under that rule automatically satisfies the "constitutional criteria" of the obscenity test.<sup>144</sup> Like New York, the California Supreme Court limited the reach of its penal statute, holding that "it is clear that Section 311 prohibits only 'hard-core pornography' . . . and that '[t]o constitute obscenity . . . the material must contain a graphic description of sexual activity.'"<sup>145</sup>

In 1968, the Supreme Court of Wisconsin discussed the "hard-core" versus *Roth* test in *State v. Voshart*, where it noted that state laws must "stay within the bounds of the constitutional criteria" and that there "appear to be two such definitions that have been given United States Supreme Court approval."<sup>146</sup> The court said that one "is the *Roth* test . . . capsulized in the *Memoirs* case."<sup>147</sup> The court then added: "The alternative definition defines 'obscene' as meaning 'hard core pornography' . . . this definition . . . was held to meet the constitutional criteria" in *Mishkin v. New York*.<sup>148</sup> The court held the materials "obscene under either the *Roth* test or hard core pornography test," but recognized the "hard-core rule" as "most clearly indicating what may be considered obscene . . . and that leaves the smallest room for disagreement," quoting Justice Harlan's dissent in

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740, 656 P.2d 1170 (1983); *People v. Souter*, 125 Cal. App. 3d 563, 178 Cal. Rptr. 111 (1981); *People v. Kovner*, 96 Misc. 2d 414, 409 N.Y.S.2d 349 (N.Y. Sup. Ct., 1978); *People ex rel. Van De Kamp v. American Art Enters.*, 75 Cal. App. 3d 523, 142 Cal. Rptr. 338 (1977); *People v. Fixler*, 56 Cal. App. 3d 321, 128 Cal. Rptr. 363 (1976). *But see* *People v. Freeman*, No. 000070 (Cal. Sup. Ct., filed Aug. 25, 1988) (Westlaw, CA-CS file) (finding that hard-core film production is pandering only when the state proves the performers acted for the purpose of "sexual arousal or gratification," and the film is legally obscene).

142. *Sensenbrenner*, 26 Ohio App. 2d at 213, 271 N.E.2d at 31.

143. *Id.*

144. *Mishkin v. New York*, 383 U.S. 502, 508 (1966).

145. *Bloom v. Municipal Court*, 16 Cal. 3d 71, 79, 127 Cal. Rptr. 317, 322, 545 P.2d 229, 234 (1976) (citations omitted).

146. *State v. Voshart*, 39 Wis. 2d 419, 429, 159 N.W.2d 1, 6 (1968).

147. *Id.* at 429, 159 N.W.2d at 6.

148. *Id.* at 430, 159 N.W.2d at 7.



*Memoirs* that court and others will "know . . . when [they] see it."<sup>149</sup>

The "hard-core rule" has been used often by courts as a shortcut for finding obscenity, as an Ohio trial court did in enjoining the movie *Deep Throat* by finding that "this is hard core pornography and as such it can and does speak for itself. The Court holds as a matter of law that this film is hard core pornography and obscene . . . ."<sup>150</sup>

In 1971, the Court of Special Appeals of Maryland asserted that "in some instances the more traditional methods of proof by expert testimony may be dispensed with, where the questioned material is such 'hard-core pornography' that it 'screams for all to hear' as to its pornographic content."<sup>151</sup> In 1987, the same court reviewed the application of this "shortcut" in a case where the trial judge did not apply the *Miller* test but instead found the material "hard-core."<sup>152</sup> The appeals court held the materials not obscene and not "hard-core, black market, under the counter type," as the trial court had found, when compared to the explicit and deviant materials found to be "hard-core" in earlier cases.<sup>153</sup> Although the material before the court did not qualify as "hard-core," and did not meet the *Miller* test either, the court said, "[I]t is not clear since *Miller* was decided by the Supreme Court whether the 'evidentiary shortcut' is still viable," even though it is still "possible," but warned that "if trial judges use the 'evidentiary shortcut' of *Woodruff*, they should state with some particularity the reasons why they have found the magazines or books to be obscene."<sup>154</sup>

The proposed per se rule would eliminate any vagueness, by covering only the type of hard-core material that depicts (not describes) penetration clearly visible. Because this proposal is completely objective, if a trial court found material to be hard-core pornography under the proposal, the appellate courts need not differ with that application of the term.

Under the proposed per se hard-core rule, the pornographers, the public, and the juries could apply the objective test to see if

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149. *Id.* at 430, 159 N.W.2d at 7 (quoting *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. Attorney General, 383 U.S. 413, 457 (1966) (Harlan, J., dissenting); see also *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

150. *Whiting v. Roxy, Ltd.*, 66 Ohio Op. 2d 369, 371, 293 N.E.2d 889, 891 (C.P. 1973).

151. *Woodruff v. State*, 11 Md. App. 202, 226, 273 A.2d 436, 449 (1971) (citation omitted).

152. *5297 Pulaski Highway v. Town of Perryville*, 69 Md. App. 590, 519 A.2d 206 (1987).

153. *Id.* at 606, 519 A.2d at 214.

154. *Id.* at 604-05, 519 A.2d at 214.

the material depicts explicit sex. The trial and appellate courts could "conduct an independent review of constitutional claims when necessary," as recognized in *Miller*.<sup>155</sup> The Court in *Miller* was concerned that "hard-core" pornography would be exposed "without limit" if "the inability to define regulated materials with ultimate, godlike precision altogether removes the power of the states or the Congress to regulate."<sup>156</sup> The *Miller* test allows all obscenity to be determined, but the "hard-core" rule allows the most obvious obscenity to be determined with ultimate, though perhaps not "godlike," precision.

There is no guarantee that the United States Supreme Court would uphold a ban on all commercial exploitation of hard-core pornography without proof of its obscenity under the *Miller* test. The Supreme Court, however, did uphold New York's child pornography law without requiring proof of obscenity.<sup>157</sup> Some state or the Congress must lead the nation in new theories in obscenity law and push the Court to approve these changes so that others may follow. The Supreme Court already has given its approval to many innovative solutions. In a Detroit zoning case requiring the dispersal of sexually oriented businesses, Justice Stevens wrote that "the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems."<sup>158</sup>

New York has a history of leadership and innovation in obscenity laws, and the United States Supreme Court has supported New York's bold and intelligent moves.<sup>159</sup> Since *Ferber*, eighteen states have enacted statutes criminalizing the mere possession of child pornography as per se illegal, and the state supreme courts in Ohio, Alabama, and Illinois have sustained those laws.<sup>160</sup> Sexual devices such as dildos and artificial genitals

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155. *Miller v. California*, 413 U.S. 15, 25 (1973).

156. *Id.* at 28.

157. *New York v. Ferber*, 458 U.S. 747 (1982).

158. *Young v. American Mini Theatres*, 427 U.S. 50, 71 (1976) (upholding location zoning of "adult" bookstores and theatres because of the "secondary effects" those businesses had on a downtown area, even though there was no determination that the bookstores and theatres trafficked in obscenity); see also *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

159. See *New York v. Ferber*, 458 U.S. 747 (1982) (upholding New York's child pornography law); *Heller v. New York*, 413 U.S. 483 (1973) (upholding New York's use of search warrants); *Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding New York's "harmful to minors" law); *Mishkin v. New York*, 383 U.S. 502 (1966) (upholding New York's application of "deviant" standards); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957) (upholding New York's injunction statute).

160. ALA. CODE § 13 A-12-192 (1982 & Supp. 1987); ARIZ. REV. STAT. ANN. § 13-3553 (A)(2) (Supp. 1987); COLO. REV. STAT. § 18-6-403 (1986); FLA. STAT. ANN. § 827.071 (4)-(5)

were classified as obscene devices and made illegal per se in Georgia for commercial distribution. The Georgia Supreme Court explicitly approved the statute<sup>161</sup> and now Texas has upheld a similar law.<sup>162</sup> Treating hard-core pornography in the same manner that the law treats child pornography and obscene devices would provide a much needed definitive solution to the pornography problem in America.

In a nationwide survey of law enforcement efforts after *Miller*, a *New York University Law Review* study concluded that "[o]bscenity laws have been characterized as having only a minimal effect on the conduct of prosecutors and pornographers."<sup>163</sup> More than half of the prosecutors surveyed said *Miller* had no effect on convictions, twenty-nine percent said *Miller* helped the prosecution, and seventeen percent said it helped the defense.<sup>164</sup> One of the responses, from an Ohio prosecutor, was typical in its plea: "I would like to see communities given a definition by the [Supreme Court] which would enable them to make a specific listing of items which would be per se obscene by their legislative body's interpretation of the prevailing community standards."<sup>165</sup> The authors found that the public had become more tolerant of pornographic material and concluded that this "liberalization of attitudes has in turn influenced prosecutors to handle only cases involving particularly hard core materials."<sup>166</sup>

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(Harrison Supp. 1987); GA. CODE ANN. § 16-12-100 (b)(8) (Supp. 1987); IDAHO CODE § 18-1507A (1987); ILL. REV. STAT. ch. 38, para. 11-20.1(2) (1985); KAN. STAT. ANN. § 21-3516 (Supp. 1987); MINN. STAT. ANN. § 617.246 (4) (West 1987); MO. REV. STAT. § 573.037 (Supp. 1987); NEB. REV. STAT. § 28.808 (1988); NEV. REV. STAT. § 200.730 (1987); OHIO REV. CODE ANN. § 2907.321 (Anderson 1987); OKLA. STAT. ANN. tit. 21, §§ 1024.1-1024.2 (West 1983); S.D. CODIFIED LAWS ANN. § 22-22-23.1 (1988); TEX. PENAL CODE ANN. § 43.26 (Vernon Supp. 1988); UTAH CODE ANN. § 76-5a-3 (Supp. 1988); WASH. REV. CODE ANN. § 9.68 A.070 (1988); see *State v. Meadows*, 28 Ohio St. 3d 43, 503 N.E.2d 697 (1986), cert. denied, 107 S. Ct. 1581 (1987); *Felton v. State*, 526 So. 2d 635 (Ala. Crim. App. 1986), aff'd, 526 So. 2d 638 (Ala. 1988); *People v. Geever*, 122 Ill. 2d 313, 522 N.E.2d 1200 (1988).

161. *Sewell v. State*, 238 Ga. 495, 233 S.E.2d 187 (1977); *Teal v. State*, 143 Ga. App. 47, 238 S.E.2d 128 (1977) (upholding GA. CODE ANN. § 16-12-80 (c) (1984)). Both *Sewell* and *Teal* were dismissed "for want of substantial federal question" by the Supreme Court, 435 U.S. 982 (1978); 435 U.S. 989 (1978). Such a dismissal of an appeal is a decision on the merits and affirms the state court decision. *Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975).

162. *Yorko v. State*, 690 S.W.2d 260, 265-66 (Tex. Crim. App. 1985) (upholding TEX. PENAL CODE ANN. § 43.21 (a)(7) (Vernon Supp. 1988)); see also *Red Bluff Drive-In v. Vance*, 648 F.2d 1020, 1027-28 (5th Cir. 1981), cert. denied, 455 U.S. 913 (1982) (upholding the Texas statute). But see *People v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348, 368-70 (Colo. 1985).

163. Project, *supra* note 13, at 928.

164. *Id.* at 900.

165. *Id.* at 896 n.403.

166. *Id.* at 898.

The *Miller* standard, as modified by *Pope* and *Smith*,<sup>167</sup> could control the hard-core industry if vigorously enforced in most jurisdictions by federal and state prosecutors, as the Attorney General's Commission recommended.<sup>168</sup> Its inherent weakness is its subjective application in various local communities and the undeniable confusion caused by differing interpretations of each word of the test. The United States Supreme Court could cure much of the problem by approving one proper charge to a jury or one simple and correct statement of the test by a court. The hard-core rule, on the other hand, would do in objectivity what such a ruling by the Court would do in removing subjectivity. If the law of obscenity—the so-called “intractable” problem<sup>169</sup>—is to be clarified, these changes should be made soon, before the future becomes the past and we are forced to live forever with the disgrace of the present.

### CONCLUSION

Congress and the state legislatures should adopt an objective definition of obscenity that would make all hard-core pornography per se illegal for commercial distribution. The Supreme Court in analyzing the hard-core rule should apply the balancing of interests test used to sustain the New York child pornography law. In *Ferber*, the Court held that in rare instances, when “the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.”<sup>170</sup> In *Pope*, Justice Scalia approved an objective approach to the value prong of *Miller* and suggested that perhaps a “reexamination” of *Miller* was in order.<sup>171</sup>

Evidence of the harmful effects of pornography and law enforcement difficulties in this area<sup>172</sup> are strong reasons for adoption of a per se rule. Hard-core pornography is most certainly an area where “expressive interests,” if any, are heavily outweighed by the “evil to be restricted.”<sup>173</sup>

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167. *Pope v. Illinois*, 107 S. Ct. 1918 (1987); *Smith v. United States*, 431 U.S. 291 (1977).

168. 1 COMM'N ON PORNOGRAPHY, *supra* note 3, at 364-72.

169. *Miller v. California*, 413 U.S. 15, 16 (quoting *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 704 (1968) (Harlan, J., concurring and dissenting)).

170. *New York v. Ferber*, 458 U.S. 747, 763-64 (1982).

171. *Pope*, 107 S. Ct. at 1923 (Scalia, J., concurring).

172. See 1 COMM'N ON PORNOGRAPHY, *supra* note 3, at 299-351.

173. *Ferber*, 458 U.S. at 763-64.

Intellectual freedom in America exists at a higher level than viewing people engaged in various sexual acts. Voyeurism is not a fundamental right. If Congress and state legislatures truly desire to preserve the traditional fabric of American society for future generations, they should adopt the most innovative and effective laws possible under our Constitution. In dealing with the problem of hard-core pornography, a per se rule may be necessary to preserve our heritage.